

FILED
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

DATABASE SERVICE)
MANAGEMENT, INC., a New Jersey)
corporation,) Civil No. 2:96-CV-188J
Plaintiff,)
vs.) **ORDER**
BEEHIVE TELEPHONE COMPANY,)
Defendant.)

The plaintiff, Database Service Management, Inc. ("DSMI"), commenced the instant action against Beehive Telephone Company, Inc. ("Beehive") on March 1, 1996. On June 6-7, 1996, Beehive answered, counterclaimed, and filed a Motion for Temporary Restraining Order and Preliminary Injunction, which was heard by this court on June 13, 1996. At that time, the court ordered that DSMI restore service to Beehive on 56 toll-free telephone numbers which had been disconnected beginning May 29, 1996, and that DSMI hold up to 10,000 additional toll-free "800" numbers pending further order of the court.¹

The parties filed additional motions concerning the counterclaim and its amendment, and the court conducted a series of status conferences concerning this matter, both in an effort to resolve the form of written order embodying the preliminary relief granted in June 1996, and to determine what issues remained to be decided.

¹ The numbers in question apparently have the prefix "629" (i.e., 800-629-xxxx), and are referred to by the court of appeals as "629" numbers.

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On March 2, 1998, the court held another status conference in this case. After discussion with counsel, the Court concluded that no issues remained that are appropriate for adjudication in this forum. DSMI's claim for payment had been satisfied by the payment actually made, and additional issues raised by Beehive's amended counterclaim seemed more appropriately determined by the Federal Communications Commission.

On July 13, 1998, the court filed and entered two orders: (1) FINDINGS, CONCLUSIONS AND PRELIMINARY INJUNCTION (dkt. no. 72), memorializing this court's prior bench rulings; and (2) a final ORDER (dkt. no. 73) dismissing plaintiff's complaint with prejudice, and dismissing counts 1 through 5 of the amended counterclaim without prejudice to their assertion before the Federal Communications Commission, permitting either defendant or plaintiff to renew those aspects of the controversy if such renewal was desired. This court's final Order also ordered that DSMI restore to Beehive nearly 10,000 toll-free "800" telephone numbers which were the subject of this proceeding to the defendant Beehive and which had not previously been restored to Beehive by DSMI.²

² There appears to be some confusion at the court of appeals concerning the July 13, 1998 Orders. The first order entered, FINDINGS, CONCLUSIONS, AND PRELIMINARY INJUNCTION, reflected this court's prior ruling that DSMI "hold the balance of the Numbers which it repossessed from Beehive until further order of this Court," and the second Order directed that DSMI "restore to defendant Beehive the use of all of those telephone numbers earlier allocated to Beehive," i.e., the balance of the 10,000 "800" numbers at issue herein. However, at page 6 of the court of appeals' Revised Order, it is recounted that "[t]hree days after entry of" the order restoring the balance of the 10,000 numbers to Beehive, "the district court entered a separate order directing DSMI to . . . hold the balance of the ['929'] [n]umbers which it repossessed from Beehive until further order of this Court" The court of appeals comments in footnote 3 that "[t]hese two orders can reasonably be read as inconsistent."

Reviewing the docket and the file in this case, it appears that the court of appeals may have things backwards. Early on, this court directed DSMI to hold the balance of the 10,000 numbers in "unavailable" status pending further order of the court. It took no small effort on the part of court and counsel to arrive at an acceptable form of written order embodying that ruling, and the July 13 PRELIMINARY INJUNCTION was signed and entered for that purpose *nunc pro tunc* to April 21, 1997. The final Order, also entered by this court on July 13, constituted a "further order of this Court" directing DSMI to restore the numbers to Beehive. These orders do not coexist in continuing conflict; the final order superseded the terms of the preliminary injunction. Perhaps that is why "[b]oth parties apparently read the orders as requiring the restoration of all '629' numbers to Beehive," as the court of appeals suggests. The only document filed "three days later" in this case was DSMI's notice of appeal (dkt. no. 74) from the preliminary injunction.

DSMI sought a stay of the July 13, 1998 Order, appearing before the court on July 31 and August 10, 1998. The court denied DSMI's motion for stay, but directed that Beehive notify the court and DSMI of any prospect of using additional "800" numbers and that Beehive not make any disposition of any additional "800" numbers from the 10,000-number block absent further order of the court.

By an amended notice of appeal filed July 17, 1998 (dkt. no. 75), DSMI appealed both if this court's July 13, 1998 Order to the United States Court of Appeals for the Tenth Circuit. On November 24, 1998, the court of appeals entered an order denying DSMI's motion to suspend this court's prior order, dismissing DSMI's appeal, and remanding the matter to this court for modification of the July 13, 1998 Order and referral of the matter to the FCC under the doctrine of primary jurisdiction. *Database Service Management, Inc. v. Beehive Telephone Company*, No. 98-4117 (10th Cir. November 24, 1998) (Order and Mandate). On January 6, 1999, the court of appeals entered a Revised Order, which was received on January 12, 1999, as a supplement to the mandate of the court of appeals. *Database Service Management, Inc. v. Beehive Telephone Company*, No. 98-4117 (10th Cir. November 24, 1998), incorporating essentially the same directions.

Based upon the Revised Order of the court of appeals, and pursuant to the mandate thereof,

IT IS ORDERED that the matters addressed by counts 1 through 7 of the amended counterclaim of Beehive Telephone in this proceeding are hereby referred to the Federal Communications Commission (FCC) for hearing and determination;

IT IS FURTHER ORDERED that paragraph 2 of this court's July 13, 1998 Order (dkt.

no. 73) is VACATED and further proceedings before this court on claims asserted in the amended counterclaim are hereby STAYED pending the outcome of proceedings before the Federal Communications Commission; and

IT IS FURTHER ORDERED that Paragraph 3 of this court's July 13, 1998 Order (dkt. no. 73) is amended to read as follows:

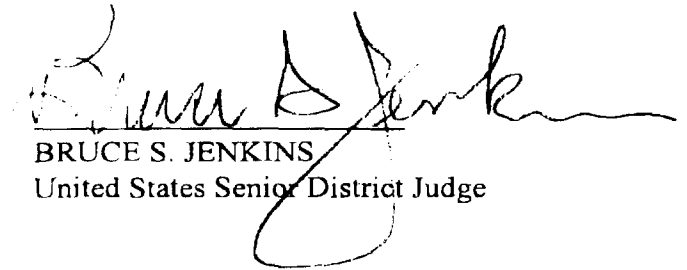
3. Excepting the numbers which were embraced in the earlier directive of the Court, and which already have been restored to defendant Beehive, ~~plaintiff DSMI forthwith shall restore all telephone numbers which are the subject of this proceeding to the defendant Beehive~~ all "629" numbers of the 10,000 not currently in use by Beehive or other RespOrgs are to be placed by DSMI in "unavailable" status pending FCC resolution of the matters referred to it by the district court, provided, however, that Beehive shall be allowed to obtain a "629" number from the "unavailable" block when necessary to provide service to a new Beehive customer or additional service to an existing Beehive customer.⁵ Additionally, any current holder of a "629" number shall, in accordance with the SMS/800 Tariff, be allowed to voluntarily transfer RespOrg status from Beehive to another RespOrg.

⁵ Plaintiff DSMI and defendant Beehive should cooperate with each other to the end that ~~this restoration of numbers may occur as expeditiously as possible, so that the~~ such additional numbers may be put into service, becoming useable by defendant Beehive, as quickly as practicable.

Counsel shall forthwith make such arrangements as are necessary to facilitate the transfer of the matter to the Federal Communications Commission as directed herein.

DATED this 20 day of January, 1999.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Bruce S. Jenkins", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

BRUCE S. JENKINS
United States Senior District Judge

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United States District Court
for the
District of Utah
January 21, 1999

* * MAILING CERTIFICATE OF CLERK * *

Re: 2:96-cv-00188

True and correct copies of the attached were mailed by the clerk to the following:

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